No. 11983

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

VERNON O. TYLER, *Appellant*,

vs.

S. BIRCH & SONS CONSTRUCTING COMPANY, a Corporation, and MORRISON-KNUDSEN COMPANY INC., a Corporation, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

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805-10 Arctic Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLANT

JURISDICTION

This action was originally instituted under provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U.S.C.A., Sec. 201-219, in the United States District Court for the Western District of Washington, Northern Division, to recover sums due overtime labor performed by appellant individually and his assignors for the appellees during the years 1944 and 1945. The cause was tried by the court in May, 1946 (R. 4). A judgment was entered in favor of the present appellant. Thereafter the present appellees appealed to this court (see record and briefs in Cause No. 11463). After argument but before deci-

sion in this court in May, 1947, the present appellees moved this court for an order remanding the causes to the District Court in order to permit the defendants to proffer pleadings under the then recently passed Portal to Portal Act of 1947 (R. 7). This order was granted and the causes remanded to permit such proffer (R. 7). Thereafter, November 4, 1947, the defendants proffered pleadings and defenses under the Portal to Portal Act. On March 2, 1948, after a trial upon the issues, the court entered its Findings of Fact and Conclusions of Law (R. 16, 17). The instant appeal is an appeal from the judgment of the court wherein the causes of action of the appellant were dismissed on the ground that the defendant had pleaded and proved defenses under Sec. 9 and 11 of the Portal to Portal Act of 1947.

While the jurisdiction of the District Court to hear and try this action and of the Circuit Court of Appeals to entertain this appeal will be conceded by all, the following statutes expressly confer and grant jurisdiction:

Title 28 U.S.C.A., Sec. 41(8);
Title 28 U.S.C.A., Sec. 225(a).

STATUTE INVOLVED

The provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U.S.C.A., Sec. 201 to 219, and the provisions of the Portal to Portal Act of 1947, Title 29 U.S.C.A., Sec. 251, *et seq.*, pertinent to this appeal are quoted for the convenience of the court in Appendix A.

PLEADINGS

Appellant deems it unnecessary to reiterate here the pleadings and issues arising under plaintiff's amended complaint filed pursuant to the Fair Labor Standards Act, 29 U.S.C.A., Sec. 216(b) in the District Court of the United States for the State of Washington, Northern Division, pursuant to 28 U.S.C.A., Sec. 41(8). (Cf. R. 2, 3, Cause No. 11463). These issues were resolved in appellant's favor by the said District Court in Cause 11463. Subsequent, however, to the filing of briefs and argument in this court, but prior to decision, the Portal to Portal Act of 1947 was enacted by Congress, and under the terms thereof this court entered an order remanding this cause to the trial court in order to permit appellees to proffer pleadings thereunder (R. 7) as follows:

"V.

"That all contracts of employment between the plaintiff and the assignors of plaintiff and these answering defendants, and all wages and salaries paid thereunder, were approved and paid in good faith by defendants in conformity with and in reliance upon, administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit: the U. S. War Department and War Department Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such U. S. War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

"VI.

"That any act or omission of defendants under

the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, or to any of the assignors of plaintiff, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended."

STATEMENT OF FACTS

(a) General

The appellant and his assignors worked for the appellee companies in the construction of certain Aleutian Island air bases during the years 1944 and 1945. As jobsite employees at the Aleutian base of operations for the appellee companies, the appellant and his assignors worked 70 hours a week, 10 hours each day. Each was paid for 8 hours per day for the first 6 days of the week at straight time rates.

Appellant brought suit under the Fair Labor Standards Act to recover for 12 hours time each week, admittedly not paid, and for additional half time for hours worked in excess of 40 hours each week. The appellant reduced its claim to judgment. On the present appeal, it stands admitted that the appellee companies violated the Fair Labor Standards Act and that the appellee companies were indebted to the appellants for both straight time and overtime compensation under that act.

The present appeal is to determine whether or not the appellee companies have exonerated themselves from their admitted liability by reason of their having pleaded and proved facts sufficient to sustain exon-

eration from liability under the terms of Sec. 9 and 11 of the Portal to Portal Act of 1947. The documentary evidence which appellees offered and proved upon the trial of this cause, and which the appellees contend is sufficient as to exonerate them from liability to the appellant under the terms of the Portal to Portal Act of 1947 is summarized in a stipulation and pretrial order that is a part of the record (R. 40 to 74). Succinctly stated, it was the position of the appellees that they received written communications from the U. S. War Department or the Corps of Engineers of the U. S. War Department, or the Wage Administration Agency of the U. S. War Department which they contend constitute regulations, orders, rulings, approvals and interpretations of such a character as to fall within the contemplation of Sec. 9 and 11 of the Portal to Portal Act of 1947, thereby exonerating the appellee companies from any liability to the appellant and his assignors. Those principal communications, material hereto, are classified as follows:

1. Prime contract and supplemental instructions relating to Uniform Contracts of Employment for non-manuals.

2. War Department Circular Letters Nos. 2236 and 2390 (Exhibits 14 and 15).

3. Contracting Officer Approvals of Defendants' pay schedules and policies (Exhibits 25 and 27).

4. War Department Wage Administration Agency Approval (Exhibit 16).

5. Miscellaneous specific communications and instructions relating to the foregoing exhibits and to

overtime pay policies generally (Exhibits 17, 18, 19, 43, 28, 44, 45, 34, 40, 24, 33, 41, 59, 58, 63, 20).

(b) Specific Documentary Evidence

The specific provisions of the written documentary evidence introduced by the appellees, which appellees contend operate to exonerate them from liability to the appellants by reason of Sections 9 and 11 of the Portal to Portal Act of 1947, are now set forth in the order in which the same were received by the appellee companies.

The prime contract executed by the defendant and the United States of America on September 30, 1943, Contract No. 202 (Exhibit 13 (R. 47), provides in Article X, §1:

> "(d) Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof, Appendices D and E.
>
> "(e) It is contemplated that work at the site will be carried out on the basis of two 10-hour shifts a day, 7 days a week."

Appendix E of Exhibit 13 (R. 47) contains the following provisions:

> "Article 2.—Compensation:
>
> "a. Base Compensation. The employee is employed at a 'base compensation' rate of ..... per ..... * * *."
>
> "Article 8.—Prosecution of Work:
>
> * * *
>
> "b. Non-manual employees will be divded into the following groups determined by their weekly

base compensation: * * * (2) Group 'B' whose salaries are from $50 to $90 per week inclusive * * *.

* * *

"d. Group 'B' employees will be expected to work any reasonable number of hours during the first six days' work in the regularly established work week without payment other than the base compensation. They will be paid at two times the straight hourly rate for all authorized work performed on the seventh consecutive day the employee works in any regularly established work week."

Supplemental Agreement No. 8, being a part of Exhibit No. 13 (R. 47) dated August 1, 1944, provided that thereafter conditions of employment and rates of pay would be "issued, amended and approved from time to time by the contracting officer."

On August 21, 1944, the Contracting Officer (being an employee of U. S. Engineers, U. S. Army) wrote to the defendant in Exhibit 53 (R. 58) "to immediately place in use the revised Uniform Contracts of Employment for manual and non-manual personnel to be utilized for employment of personnel in Alaska." A second revision was issued on October 13, 1944, in Exhibit 54 (R. 58). Both Exhibits 53 and 54 contain the same provisions as the prime contract, Exhibit 13 (R. 47), with respect to the formula for overtime compensation.

The Contracting Officer furnished the defendant on February 14, 1945, Exhibit 60 (R. 60) which is a comparative summary of the various documents

theretofore transmitted by the Contracting Officer to the defendant relating to employment contract.

On June 6, 1945, the Contracting Officer wrote a supplement thereafter to the non-manual employees contract, Exhibit 66 (R. 62) which provided *inter alia* as follows:

> "It is understood that the established work week at the initial place of work assignment consists of seven 10 hour days and that the base pay rate of $....., stipulated in Article 2, item a, is full and complete compensation for the first six 10 hour days worked during the work week. * * *"

Circular Letter No. 2236 dated January 9, 1943, Exhibit 14 (R. 47 provided *inter alia* as follows:

> "5. Requirements as to hours of work, overtime and leave allowances for non-manual employees * * *.
>
> * * *
>
> "b. For this purpose, non-manual employees will be classified in the following groups:
>
> * * *
>
> "(2) Group 'B' employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in Groups 'D' and 'E'.
>
> * * *
>
> "c. The base salaries of *all* employees of Groups 'A', 'B' and 'C' will be established on the basis of a minimum work week of 48 hours.
>
> * * *
>
> "e. Group 'B' employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. * * *."

Circular Letter No. 2236 was transmitted to the defendant on February 20, 1943, by Exhibit 19 (R. 49).

Article VII of the prime contract, Exhibit 13 (R. 47) provided as follows:

> "The extent and character of the work to be done by the Contractor shall be subject to the general supervision, direction, control and approval of the Contracting Officer to whom the Contractor shall report and be responsible."

Exhibit 22 (R. 49) is a schedule of non-manual job classifications and salary ranges which was transmitted to the Contracting Officer, who responded with Exhibit 25 (R. 50) a portion of which reads as follows:

> "You are advised that your letter with inclosures was forwarded to the Engineer, Alaskan Department, by letter dated 20 October, 1943, file SE 161 (Adak Depot 202.5) 1 PADBL 2Y. In first indorsement thereto, dated 24 October, 1943, the Engineer, Alaskan Department, approved the Organization Chart and Schedule without change and recommended that action be taken to adjust the salary range for Assistant Superintendents as proposed in your letter."

From time to time the defendant submitted changes in Exhibit 22 (R. 49) relating to job classifications and salary ranges, and received similar responses from the Contracting Officer. See Exhibit 29 (R. 41), Exhibit 31 (R. 51), Exhibit 37 (R. 53), Exhibit 38 (R. 53).

On November 5, 1943, Contracting Officer wrote

the defendant, Exhibit 25 (R. 50) stating *inter alia* as follows:

> "In order to obtain approval for adjustment in an established salary range, it will be necessary that your office prepare appropriate request on forms prescribed by the Treasury Department for submitting to higher authority. The office will furnish the necessary forms and assist in forwarding your request through proper government channels." (Exhibit 25) (See also Exhibit 27)

Thereafter the defendant, with the help of the Contracting Officer, prepared applications to the Salary Stabilization Unit of the Treasury Department for approval of salary increases and pay roll policies, Exhibit 30 (R. 51) and Exhibit 32 (R. 52). See also Exhibit 35 (R. 52) where the defendant employed legal counsel. Exhibit 36 (R. 53) recites that the Salary Stabilization Unit application would be handled for the defendant by the War Department.

On April ...., 1944, an application for approval of the Wage Administration Agency of the War Department for salary ranges and to pay policies was submitted. Exhibit 42 (R. 54).

On April 27, 1944, the Wage Administration Agency issued Exhibit 16 (R. 48) familiarly called the Abersold Directive, a portion of which provided as follows:

> "3. For this purpose, non-manual employees will be classified in the following groups:
>
> * * *
>
> "b. Group 'B'. Employees whose base salaries

are between $50.00 and $90 per week, inclusive, except those included in Group 'D' and 'E'.

* * *

"4. The base salaries of *all* employees of Groups 'A', 'B', 'C' and 'E' will be established on the basis of a minimum work week of 48 hours * * *.

* * *

"6. Group 'B' employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation * * *." (Exhibit 16)

The Abersold Directive, Exhibit 16 (R. 48) also made its approval retroactive to September 15, 1943. A copy of the Abersold Directive was given the defendant on May 3, 1944, Exhibit 43 (R. 55) and Contracting Officer wrote the defendant to place it into effect immediately, Exhibit 48 (R. 56) and Exhibit 49 (R. 56).

December 7, 1943, the Adak Engineer wrote a memorandum, Exhibit 28 (R. 51) to defendant, a portion of which states:

"Non-manual employee not entitled to overtime, except on authorized seventh consecutive day of scheduled work week." (Exhibit 28).

Later, Exhibit 44 (R. .....) from the Engineer of the Alaskan War Department stated as follows:

"Executive Order No. 9240 limits payment of overtime to Class B employees (those earning over $50 per week) to those worked on the seventh day only." (Exhibit 44).

Contracting Officer wrote Exhibit 34 (R. 52) Februarg 13, 1944, as follows:

> "It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days."

Defendant's project manager requested on March 18, 1944, authorization to pay non-manual employees in Group "B" overtime compensation for two (2) additional hours each day, Exhibit 39 (R. 53). The request was denied in Exhibit 40 (R. 53).

Prior to February, 1945, claims were being filed by employees with the defendant for additional overtime compensation based upon the Federal Labor Standards Act and the defendant was advised in Exhibit 59 (R. 60) by the Contracting Officer as follows:

> "In response to our inquiry, the office, Chief of Engineers, has recently re-affirmed previous instructions that regulations of Circular Letter 2390 are currently applicable to operations of Cost-Plus-A-Fixed-Fee Contractors. In view of these instructions claims based on alleged violations of the Fair Labor Standards Act shall continue to be denied." (Exhibit 59)

And the defendant was furnished a copy of a telegram from General Robins, Acting Chief of Engineers, Exhibit 58 (R. 60) which reads as follows:

> "Reurlet dated 22 January, 1945, subject applicability of Fair Labor Standards Act to CPFF contractors no regulations superseding circular letter 2390 have been issued. Claims of Employees of CPFF contractors paid in accordance

with C L 2390 should be investigated and reported as outlined in paragraph 750.23 Orders and Regulations." (Exhibit 58)

The defendant received a Litigation Procedure Manual, dated December 8, 1944, Exhibit 57 (R. 60) and April 5, 1945, Exhibit 65 (R. 62) advising them how the defendant should proceed in the event of a lawsuit.

The Contracting Officer wrote directly to W. R. Morrison, Chairman of the Employees Committee presenting such claim (Exhibit 63 (R. 62) which reads in part as follows:

> "Analysis of the claims has revealed that the amounts represent wages allegedly due for time in excess of forty hours during the first six days of a week, computed at one and one-half the basic hourly rate, less any amounts already paid for time in excess of forty hours.
>
> "After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety."

George A. Parks wrote a letter to his Senator, who transmitted it to the Administrator of the Wage-Hour Division and correspondence is found in Exhibit 55 (R. 60). He did not give his job description or the nature of the work the defendant was performing.

On June 22, 1943, the Contracting Officer wrote to the defendant, Exhibit 22 (R. 49) in part which reads as follows:

> "1. a. Problems frequently arise under cost-plus-fixed fee contracts as to the applicability or

interpretation of laws or Executive orders affecting labor costs of the contractor.

* * *

"c. Since the War Department is responsible for the reimbursement of proper labor costs under the contracts, all such problems will be submitted through the contracting or commanding officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250 and 9301; Fair Labor Standards Act; Walsh-Healy Act; Davis-Bacon Act; Copeland Act; Eight Hour Law, and other laws or orders, past or future, affecting labor costs." (Exhibit 21)

The plaintiffs concede that the Officers purporting to act as Contracting Officers were so authorized to act by the United States and as defined by Article XIX of the prime contract (Exhibit 13, R. 47).

A Corps of Engineers was created by Act of Congress, 10 U.S.C.A., §181, and was "charged with the direction of all work pertaining to the construction, maintenance and repair of buildings, structures and utilities for the Army." 10 U.S.C.A. §181 lb.

In Army Regulations No. 100-70 dated November 5, 1942, Exhibit 12 (R. 46) the Authority and Responsibility of the Chief of Engineers is stated to include:

"1. Labor Relations.—As the maintenance of proper relations between management, labor and Government is essential to the efficient and expeditious conduct of construction work, the Chief of Engineers will maintain the necessary organization *to insure that proper labor relations are established and maintained, that labor laws are*

correctly administered and that proper wage rate structures and an adequate labor supply are maintained on all new work under his jurisdiction."

War Department Contract Form No. 3 (10 C.F.R. Cum. Supp. §81.1303, page 3618) provides as follows:

"b. For the purposes of this Appendix 'C', non-manual employees will be classified in the following groups:

"* * *

"Group 'B' Employees whose base salaries are between $50.00 and $90.00 per week, inclusive, except those included in Groups 'D' and 'E'.

"* * *.

"c. The base salaries of all employees of Groups 'A', 'B' and 'C' will be established on the basis of a minimum work week of 48 hours.

"* * *.

"e. Group 'B' employees will be expected to work any reasonable number of hours, six (6) days per week, without payment of additional compensation."

The National War Labor Board on November 26, 1942, issued its General Order No. 14 (29 C.F.R. Cum. Supp. §803.14; 7 F.R. 9861) providing *inter alia* as follows:

"(a) The National War Labor Board hereby delegates to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Civilian Personnel Division, Headquarters, Services of Supply (hereinafter referred to as the 'War Department Agency') the power to rule upon all applications for wage and salary adjustments (insofar as approval

thereof has been made a function of the National War Labor Board) covering civilian employees within the continental limits of the United States and Alaska employed by * * * (3) government owned, privately operated facilities of the War Department.

"* * *.

"(h) The term 'government-owned privately-operated facilities of the War Department' shall include for the purposes of this order only those facilities (1) in which the War Department has contractual responsibility for the approval of payroll costs * * *."

Here it should be made to appear that the War Labor Board's jurisdiction arose only under the Wage Stabilization Act to approve wage increases, but expressly subject to complying with requirements of the Federal Labor Standards Act.

A similar direction was issued by the Commission of Internal Revenue (10 C.F.R. Cum. Supp. §81.977 aaa).

An employee of the defendant advised in December, 1943, that he was filing a complaint with the Wage-Hour Office, Department of Labor, that the defendant was violating the Wage-Hour Law (R. 482, 483).

Vice President Northcutt wrote Exhibit 74 (R. 68) which reads in full as follows:

"The District Engineer
United States Engineer Office December 23, 1943
700 Central Building
Seattle 4, Washington

Attention: Contracting Officer, Contract Co. W-869-eng-7100

Contracting Officer, Contract No. W-45-108-eng-202 ,

Salary Conversion—Seattle Office Employees

44 Hour Basic Week to 40 Hour Basic Week

Dear Sir:

Subsequent to the inception of our Contract No. W-45-108-eng-202 and the resulting transfer of our Seattle office employees from Contract No. W-869-eng-7100 to the new contract, we received instructions in letter from your office dated October 29th, 1943 (File No. 248.3) Alaska 74 PADHF-3), to govern the conversion of the salaries of our Seattle office employees from the basic 44-hour week in effect on the old contract, to a basic 40-hour week. Other letters from your office bearing on the same subject are as follows:

October 1st, 1943—File No. 161 (Adak Depot 202.5) 19 PADBL 7G

November 30th, 1943—File No. 161 (Adak Depot 202.5) 18 PADBL 7G

December 3, 1943—File No. 248.3 (Alaska) 96 PADBF-1.

It was our understanding that this conversion was mandatory for the new contract, and was therefore an obvious necessity for the old contract, because of concurrent work on both contracts by the same employees.

Since these instructions for salary conversion

have been put into effect, numerous questions and contentions have been raised regarding the correctness of the procedure outlined in the letters of instruction referred to, some of which have led to considerable dissatisfaction among our employees, and confusion as to the proper payroll procedure to be followed. We are advised by other contractors operating under the same instructions that they have encountered similar difficulties.

We have compiled a list of several specific questions which must be answered before our payroll procedure can be continued with some assurance of correctness. Before an attempt is made to provide us with final instructions on these many confusing points, however, the following fundamental questions must be authoritatively answered:

1. Should not all basic hourly rate computations under Contract No. W-45-108-eng-202 be arrived at by dividing the basic weekly rates paid under Contract No. W-689-eng-7100, by forty-four, since the basic weekly rates for all Seattle office employees under contract No. W-869-eng-7100 (classes A, B, C per "Policy of Office of Chief of Engineers In Relation to Working Conditions on Non-Manual Employees of All Cost-Plus-A-Fixed Fee Contracttors." See District Engineer letters August 27th, 1942, File SE 3820 (Alaska Barge Terminal 7100.512, and September 6, 1942, File SE-3820 (Alaska Barge Terminal 7100.5)19), were based on a forty-four hour straight time work week?

2. Is there any reason why premium rates should have been paid for work in excess of forty

hours per week under Contract No. W-869-eng-7100?

3. Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?

4. Can the status of any Seattle office employees be changed, with regard to overtime earnings, without violation of Executive Orders No. 9240 and 9250, and if such changes can be made, is the classification of employees into classes as outlined in the policy of the Office of the Chief of Engineers governed by application of the old forty-four hour basic week or the new forty-hour basic week?

Specific instruction in detail are also needed to cover treatment of rates for janitorial and guard personnel for the O'Shea Building, which we have for some time been carrying on our payrolls.

Reimbursement for our Seattle office payrolls subsequent to November 1st, 1943, has been held in abeyance by your Project Auditor also, pending determination of the possibility of violation of Executive Orders 9240 and 9250, through the application of the instructions contained in your letter of October 29th, 1943.

We have also received a letter from the Regional Office of the National War Labor Board, dated December 20th, 1943, requesting our answer to complaint received alleging decrease in weekly rate of pay for our office employees as of November 1st, 1943. Copy of this letter, together with our reply is also attached herewith.

In view of the urgent necessity for answering the questions and complaints of our employees, and for establishing of proper payroll procedure

to be followed, as well as the necessity for advice as to the proper reply to make to the National War Labor Board, we would appreciate your earliest convenient consideration of the entire matter, so that we may be given authoritative instructions as promptly as possible for our future guidance. Please call upon us for any further assistance and cooperation we may be able to give in this connection.

Yours very truly,
GUY F. ATKINSON COMPANY
Ray H. Northcutt,
Project Manager."

On April 13, 1944, the Contracting Officer wrote Exhibit 75 (R. 68) which reads in full as follows:

PADBL-7
JIN/dbe/oo
5 April 1944

"161 (Alaska Barge
Terminal 7100.5)483 PADBL-9
13 April 1944

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington.

Gentlemen:

Reference is made to your letter of 23 December 1943 on the subject of "Salary Conversion—Seattle Office employees 44-Hour Basic Week to 40-Hour Basic Week."

In your letter were several fundamental questions which we believe have been informally answered prior to this time but are now being formally answered for your records.

With the beginning of the Cost-Plus-Fixed-Fee work in Alaska a 44-hour work week was adopted for the Seattle Headquarters Offices of the Contractors. Salaries for non-manuals were subject to the approval of the Contracting Officer. The Contracting Officer was in turn responsible for the carrying out of policies dictated by the Chief of Engineers. The general policy of limitation on salaries was that they should not be in excess of earnings during the preceding twelve month period unless there was a definite increase in responsibility and scope of the employee's duties. Most of the new employees at that time had been previously employed on a 40-hour week basic and, in comparing their proposed salary with past earnings, they were given credit for what they have made on their previous job had they worked four hours on Saturday at time and a half. Over and above this, an increase over previous earnings up to 10 percent was effected in most cases, particularly, in the lower bracket employees. It then follows that the established salary did include allowance for premium pay on work in excess of 40 hours per week.

Therefore, it was perfectly correct and fair to the employees to readjust the basic week with recognition of the premium pay that would result from the new overtime allowances. The only reason why this was not apparent to everyone from the beginning was that, after allowance for overtime was first instituted the 44-hour week was an accepted fact and the payroll and audit procedure was simpler to figure using the basic hourly wage as 1/44 of the weekly salary. Had we been strictly correct at that time the 1/46 factor should have been used. The employees

have thus benefited by a procedure that was adopted merely for convenience.

In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standards Act. Many highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.

Circular letter No. 2390 is a result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, so the legal staff of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight time overtime provisions of Grade B employees. The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The act exempts supervisory employees but nothing is said about semi-supervisory employees, so the debate is still unsettled. The compromise did obtain the assurance that the wage and hour people would not press claims

under the Act because of failure to pay time and a half overtime for the B Group.

Your third question is answered by the above, except that the mandatory part is derived from the directive of the Chief of Engineers that contracts negotiated after May, 1943, shall use the compromise agreement.

The pay status of a Seattle Office employee has not changed insofar as the regularly scheduled work week is concerned. The status in regard to overtime earnings has been changed by direction of the Chief of Engineers. This office has proceeded under directives of the Chief of Engineers for many years without presuming to question the authority of such directives. Presumably, procedures under these directives have been satisfactorily cleared by the legal staff in Washington.

As to the second part of this question, the dividing lines between A, B, and C groups is based on the salary received for the 40-hour week in accordance with Circular Letter No. 2390. The adjustment of the basic salary is simply a matter of applying a factor that would result in no change in the earnings for the regularly scheduled work week. For your information, the old 44-hour basic work week has never been recognized by the Chief of Engineers. Circular Letter No. 2236 stipulated a 48-hour work week, but the 44-hour work week had been established so long in Seattle and the contractors resisted the adoption of the 48-hour schedule, so it was never put into effect.

In regard to complaints of your employees to the War Labor Board, the authorized representa-

tive of the Contracting Officer has discussed the problem at length with officials of the War Labor Board, particularly stressing the fact that the Contractor works under direction of the Contracting Officer in all such matters and that whatever action was taken was initiated by such direction. The War Labor Board's letter of 20 December is being answered by the Contracting Officer, explaining the conversion and the results thereof. It is anticipated that the controversy will be settled when this information reaches the War Labor Board.

Very truly yours,

GEORGE F. TAIT,
Major, Corps of Engineers,
Contracting Officer."

Mr. Northcutt stated that he knew during the entire period in question that the Fair Labor Standards Act was under the exclusive jurisdiction of the Wage-Hour Division Department of Labor (R. 197).

On May 1, 1944, an inspector of the Seattle branch office of the Wage Hour Division orally advised the defendant it was in violation of the Wage-Hour law and Mr. Northcutt was directly advised by the inspector that the defendant was in violation (R. 218, 223).

On September 19, 1944, the Branch Manager of the Wage-Hour office at Seattle wrote Exhibit 73 (R. 66) which reads in full as follows:

"U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC
CONTRACTS DIVISIONS

In reply refer to:
File No. 46-683-C

"Address all Communications to:
305 Post Office Building
Seattle 11, Washington

September 19, 1944

Mr. Ray H. Northcutt
Project Manager
Guy F. Atkinson Co.
1524 Fifth Avenue
Seattle, Washington.

Dear Mr. Northcutt:

Inasmuch as certain violations of the Fair Labor Standards act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees.

Violations occurred throughout your office employees and non-manual employees groups, both in Seattle and on the Alaska project. These people were paid a straight time wage only, and additional half-time is due them for all hours over forty in any work week. Sample computations and methods for arriving at the amounts due were left with you by our Mr. Cecil, Inspector on the case. The computations should include both present and past employees for the period upon which work was being done under Contract W-46-108-eng-202. These computations should be in our hands as soon as possible to enable us to clear up this matter without undue delay.

We shall, therefore, expect the computations to reach us before September 27, 1944, after which the case will be further processed.

Yours very truly,

WALTER T. NEUBERT /s/
Branch Manager."

The defendant forwarded Exhibit 73 (R. 68) to the Contracting Officer by Exhibit 76 (R. 68) dated September 21, 1944, and requested him to outline the defendant's course of action.

The Contracting Officer on October 3, 1944, in Exhibit 78 (R. 68) acknowledged receipt of the Neubert letter, Exhibit 73 (R. 66) and stated in part as follows:

> "Since the obligation of the War Department and its contractors is not clearly defined by the Procurement Regulations, this matter was referred to the Director, Industrial Personnel Division, Headquarters, Army Service Forces, Washington, D. C. In an effort to get prompt information as to policy, we at first tried to outline the circumstances by long distance telephone on 27 September 1944 but Major Suffrin requested that detailed information be forwarded by air mail. This was done by letter of 28 September 1944 and an early reply is anticipated since we tried to impress them with the urgency of the matter.
>
> You will be advised as soon as definite instructions are received."

(c) Oral Testimony

The oral testimony offered by the appellees consisted of the testimony of Vice-President Northcutt of the Guy F. Atkinson Company and John Irvin Noble, the contracting officer of the district office of the Corps of Engineers of the Seattle office, who was Chief of Contract Projects, Division of the Alaska Division of the District Office, during the period here in question (R. 372) and Mr. Clifford T. McBride, Business Man-

ager of the Birch, Morrison & Knudsen Company during the years 1944 and 1945 (R. 461). It was stipulated by the parties that

> "(a) All evidence, documentary or oral, relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and acts of any of the defendants shall also be deemed to be the information, knowledge, beliefs and acts of all other defendants." (R. 41)

Mr. Northcutt testified on direct examination that the appellees entered into a contract with the War Department (Exhibit 13) on or about September 20, 1943, covering the construction and employment here in question, and that all payments for labor and wages, including all overtime payments, to employees hired by the appellees to perform work under the contract were made and paid in accordance with the contractual stipulation of Exhibit 13, and that Exhibit 13 and its appendices with respect to matters of wages and salaries was in accordance with circular letter 2236 (Exhibit 14) and circular letter 2390 (Exhibit 15), and that all wages and salaries paid by the appellees to any of their employees was controlled by and in accordance with those exhibits (R. 183, 4, 5, 6, 8). Mr. Northcutt further testified that all wages and salaries paid by the appellee companies to any employees hired to perform work under the terms of the contract (Exhibit 13) were approved April 27,

1944, by the War Department, Wage Administrative Agency (Exhibit 16) and that the company fully complied with and adhered to the provisions of that directive (R. 185).

Mr. Northcutt further testified that he knew that the Fair Labor Standards Act was administered by the Wages and Hours Division Department of Labor and that he knew this fact in the year 1943 when the contract was executed (R. 97); that there was nothing in the Abersold directive (Ex. 16) which he understood to relate to the overtime rates prescribed by the Fair Labor Standards Act (R. 364). Mr. Northcutt also testified that there is nothing in any of the Exhibits 14 to 79, inclusive, which modified or induced appellee to deviate from the provisions of the prime contract (Ex. 13, Art. VIII, Subdivision D, Appendix E) (R. 365-6). He testified that he was familiar with procurement regulation No. 11 (R. 353-4-5), and that neither Exhibits 14 or 15 in any way modified that paragraph of the prime contract (R. 294). Mr. Northcutt testified that he knew that the burden was upon the company to obey and abide by all applicable laws and regulations of the U. S. under the very terms of the prime contract (Exhibit 13) (R. 272). Mr. Northcutt testified that never during the progress of the work on the contracts here involved was a request made to the War Department or for that matter to the Administrator, Wages and Hours Division, Department of Labor, for a ruling on whether the Fair Labor Standards Act did or did not apply; that the company never considered it appropriate or necessary to make such a request (R. 283-284).

Northcutt also testified that he was aware of the dispute concerning the applicability of the Fair Labor Standards Act (R. 288); that the company would not have gone contrary to the War Department's instruction on overtime matters even in 1943 unless it was established with absolute certainty that the company would have been violating the law by following the War Department's instructions and that the reason for such an attitude was that the company was required to abide by the provisions of the contract (R. 302).

Mr. Noble testified that he was the contracting officer in charge of the administration of the prime contract (Exhibit 13); that the appellee company complied with all the instructions and the directives of the contracting officer with respect to the operation of the contract (R. 398-9). Mr. Noble further testified that there was not a single writing of any kind or character amongst any of the exhibits which authorized him or the War Department to pass upon the question of whether the Fair Labor Standards Act covered or applied to the project on which these claimants worked (R. 452). Mr. Noble further testified that at no time was he requested by any of the companies to obtain a ruling from any of the officials of the Wages and Hours Division, Department of Labor, with respect to the coverage of the Fair Labor Standards Act over any of the contracts in litigation (R. 427). Mr. Noble further testified that nothing in any of the appellees' Exhibits 14 and 67 ever induced him to vary the provision of the prime contract prohibiting overtime payments (R. 421). He further testified that

at no time during the life and progress of the contracts herein involved was he ever called upon by anyone to investigate or determine the particular tasks and duties performed by any of the claimants in this case (R. 422). Mr. Noble further testified that during the life of the contract herein he never made a report of the duties or the tasks actually performed by any one of the claimants in this case to any office or officers (R. 422, 423).

Mr. McBride testified in substance that his company complied with all the instructions of the contracting officer and depended upon the prime contract which required such compliance (R. 469). Mr. McBride proceeded upon the assumption that a judgment under the Fair Labor Standards Act would be reimbursable under the terms of the prime contract (Exhibit 13 (R. 475). Mr. McBride was of the opinion that his company was bound to follow the contract literally and that it did so (R. 478).

QUESTIONS OF APPEAL

By their appeal herein, appellant and his assignor claimants raise the following questions:

1. Where an employer company is found liable by a judgment entered in the U. S. District Court for certain overtime payments under the terms of the Fair Labor Standards Act, does the employer's reliance upon a prime contract between it and the Corps of Engineers of the U. S. Army constitute conformity in good faith with and reliance on "an administrative regulation, order, ruling, approval or interpretation of any agency of the United States," such as

would operate under the terms of the Portal-to-Portal Act of 1947, Sec. 9 thereof, retroactively to exonerate him from liability for violation of the terms of the Fair Labor Standards Act of 1938, as amended?

2. Where the employer company is found liable for the payment of overtime under the Fair Labor Standards Act of 1938, as amended, under a judgment of the U. S. District Court, has he shown such "good faith" sufficient retroactively to exonerate him under the terms of the Portal-to-Portal Act of 1947 where it appears that nowhere did he seek a legal ruling of any agency of the U. S., or of the Administrator of the Wages and Hours Division, as to whether his employment was subject to and covered by the Fair Labor Standards Act, and where the employer company neither sought nor obtained a ruling with respect to the applicability of the Fair Labor Standards Act of 1938, as amended?

3. Where the employer company has knowledge of the existence of the Fair Labor Standards Act and of its terms, and has knowledge of claims by certain of its employees that the Fair Labor Standards Act is applicable to its employment, and has knowledge that the position of the Corps of Engineers with respect to the non-applicability of certain provisions of the Fair Labor Standards act was never acquiesced in by the Wages and Hours Division administering the Fair Labor Standards Act, and that an unresolved controversy at all times existed between the War Department and the Wages and Hours Division with respect to the Act, and where the employer company took no steps to submit its employment classifications and

employment job descriptions to the Administrator of the Wages and Hours Division for a determination of the disputed question of coverage under the Fair Labor Standards Act, does such conduct on the part of the employer company amount to conformity in good faith with and reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the U. S. sufficient, under the terms of the Portal-to-Portal Act of 1947, retroactively to exonerate such employer company from liability under the Fair Labor Standards Act?

4. Where the provisions of a cost plus fixed fee contract entered into between an employer company and the War Department required the employer company not to pay overtime to certain employes for duties of a non-manual nature described therein (assumed by the employer company and the War Department to fall within executive and administrative exemptions of the Fair Labor Standards Act (29 USCA, Sec. 213 (a) (1))) and where it ultimately developed that such employees actually performed duties at the request of the employer outside the scope of such job classifications and such administrative and executive exemptions so as to render such employees subject to the overtime provisions of the Fair Labor Standards Act, and where such employer company never at any time submitted a report of the duties performed by such employees to any agency of the U. S. or to the Administrator of the Wages and Hours Division for the purpose of determining whether such duties actually fell within the terms of the Fair Labor Standards Act or not, under such circumstances does

such employer's conduct amount to conformity in good faith with and reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the U. S.?

5. Were the practices of the appellee companies wherein they failed to pay plaintiffs below overtime compensation as required by the Fair Labor Standards Act in "good faith," and did the appellee companies "have reasonable grounds for believing" that such practices were not in violation of the Fair Labor Standards Act.

6. Are Sections 9 and 11 of the Portal-to-Portal Act of 1947 as applied to Sections 7 and 16(b) of the Fair Labor Standards Act of 1938, as amended, unconstitutional as constituting a deprivation of property without due process?

SPECIFICATIONS OF ERROR

I.

The trial court erred in finding that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff-appellant and by the appellant's assignors in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretation of the following agencies of the United States, to-wit: the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administrative Agency, or any agency of the United States.

II.

The trial court erred in finding that all the practices of the appellees, with respect to payment of overtime compensation for all hours worked by the appellant and by the appellant's assignors, in excess of forty (40) hours in any one work week, were in good faith, and that the appellees had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

III.

The trial court erred in finding that the appellees relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

IV.

The trial court erred in finding and concluding in Paragraph I of the conclusions of law and Sections 9 and 11 of the Portal-to-Portal Act of 1947 is constitutional.

V.

The trial court ered in finding and concluding in Paragraph II of the conclusions of law that the appellees are subject to no liability to the appellant, or to the appellant's assignors, for or on account of appellees' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

VI.

The trial court erred in finding and concluding in Paragraph III of the conclusions of law that any paragraph of the findings of fact, Paragraphs 3, 5 and 7 of the conclusions of law and the judgment, hereto-

fore entered on the 28th day of May, 1946, in favor of appellant and appellant's assignors and against the appellees should be vacated, set aside and held for naught.

VII.

The trial court erred in entering judgment herein, dismissing the action of the appellant with prejudice.

ARGUMENT

Preliminary Statement

This is an action commenced "prior to" the enactment of the Portal-to-Portal Act of 1947 for services of plaintiffs below rendered several years prior to its enactment who were, as the trial court found, compensable under the Fair Labor Standards Act of 1938, as amended. Judgment for plaintiffs below was entered by the trial court May 28, 1946, prior to the Portal-to-Portal Act. Appellees seek to avoid their liability as judgment debtor by virtue of Sections 9 and 11 of the Portal-to-Portal Act of 1947. Section 9 undertook to permit the companies to exonerate their liability by pleading and proving that their violations of the Fair Labor Standards Act were the result of their reliance in good faith upon certain administrative rulings of any agency of the U. S.

In effect appellee companies, paraphrasing the applicable language of the Act, seek to plead and prove that to the extent to which they incurred liability under the terms of the Fair Labor Standards Act, they did so "in good faith in conformity with and reliance upon an administrative regulation, order,

ruling, approval or interpretation of an agency of the U. S."

Their attempt to plead and prove *reliance* necessarily presupposes that as a result of such *reliance* they were misled unwittingly into violations of the Fair Labor Standards Act of which they were unaware. The inquiry here, therefore, is first: Upon what did they *rely?* Again, was that *reliance* upon an "administrative regulation, order, ruling, approval or interpretation of any agency of the U. S."? If so, just what assurance did such agency furnish appellee companies that their acts and practices and that the particular services rendered by the plaintiffs below were *not* covered by or subject to the Fair Labor Standards Act? What reason did the appellee companies have for believing that such assurances embodied in such "regulation, order, ruling, approval or interpretation," if any, constituted an official or authoritative construction of applicability or coverage with respect to the employment of the plaintiffs below under the terms of the Fair Labor Standards Act?

In resolving these questions, let us have in mind that the "good faith" and the "reliance" pleaded and urged by the appellee companies to exonerate their liability are principally, basically and for that matter exclusively predicated upon a "master contract" executed between the appellee companies and the War Department prior to the initiation of the construction constituting the subject matter of the employment here in question. That contract is spoken of and iden-

tified throughout the record as the Prime Contract, Exhibit 13.*

By its terms the prime contract provides for no overtime payment to non-manual employes. It must, however, be observed that it does not undertake to vary, modify or disregard the overtime provisions of the Fair Labor Standards Act. It does not require appellee companies to refuse overtime payment to these employees entitled to such overtime compensation by the Fair Labor Standards Act. On the contrary, the prime contract is bottomed upon an acknowledgment of the applicability and the force and effect of the overtime provisions of the Fair Labor Standards Act. It expressly requires the appellee companies as a contracting party to abide by and to obey all the laws of the United States.

It may fairly be said—and this conclusion is established by the evidence (Exhibit 75) (R.....)—that the parties to the prime contract assumed that non-manual employees such as the plaintiffs below were included under either the administrative or executive exemptions of the Fair Labor Standards Act. This assumption, however, was purely gratuitous for, as

*The record of course is replete with letters, correspondence and communications unilaterally exchanged between officers of the Corps of Engineers of the U. S. Army and the appellee companies, which correspondence presupposes the non-payment of overtime compensation (Exhibits 15 to 79). Such correspondence, however, in the light of the testimony hereinafter referred to is merely cumulative and does not in any respect serve to modify or deviate from the terms of the prime contract (Exhibit 13).

Exhibit 75 discloses, the parties were at all times aware that the Wages and Hours Division charged with the statutory duty of administering the Fair Labor Standards Act did not acquiesce therein.

Another factual consideration is to be observed. The War Department as a party to the prime contract neither reserved nor exercised any right to hire employees or to control the assignment of their employment duties. The managerial direction of employees and the assignment of the duties which they performed at all times resided in the appellee companies. These companies were free without any restrictions, under the terms of the prime contract, to assign plaintiffs below to duties actually exempt under the executive and administrative exemptions of the Fair Labor Standards Act and in accordance with regulations of the Administrator of the Wages and Hours Division charged with administering the contract or at its option could assign them to duties subject to the overtime provisions of the Act. The fact is that the duties actually assigned to be performed by plaintiffs below were subject to the Act's overtime provisions.

One further consideration is of special significance in approaching this problem. Appellee companies under their contract with the War Department were subject to no risk of loss or liability arising or accruing in the event of violation of the Fair Labor Standards Act. Should such penalties or liability arise, it was expressly understood between the contracting parties that the companies would be reimbursed therefor. This consideration will be further noticed subsequently in the course of our discussion.

We shall discuss the subject matter of this appeal under the following points and topics:

1. Neither the prime contract nor Exhibits 13, 14, 15 and 16, nor any of the exhibits upon which the appellee companies predicate their defense, constitutes an administrative regulation, order, ruling, approval or interpretation of the character contemplated by Section 9 of the Portal-to-Portal Act of 1947.

2. The contracting officer of the Corps of Engineers as the individual upon whom these appellee companies purport to have relied is not an agency of the United States competent or qualified to issue or promulgate an administrative regulation, order, ruling, approval or interpretation within the meaning of Section 9 of the Portal-to-Portal Act of 1947.

3. The record discloses no sufficient evidence of *good faith* or *reliance* such as would serve under the Portal-to-Portal Act to exonerate appellee companies from liability.

1. Neither the prime contract nor Exhibits 13, 14, 15 and 16, nor any of the exhibits upon which the appellee companies predicate their defense, constitutes an administrative regulation, order, ruling, approval or interpretation of the character contemplated by Section 9 of the Portal to Portal Act of 1947.

It is respectfully submitted that the employer appellees have produced no oral or written declaration which constitutes a "regulation, order, ruling, approval or interpretation" within the meaning of those terms as contemplated by Sec. 9 of the Portal-to-Portal Act of 1947. The terms "administrative regu-

lation, order, approval or interpretation" in Sec 9 are not defined by the Portal-to-Portal Act. However, it has been held that the dismissal by the administrator of the Wages and Hours Act of his appeal in an injunction suit that failed against an employer was not of itself an "administrative interpretation" within the language of Sec. 9 of the Portal-to-Portal Act. *Wolferman, Inc. v. Gustafson*, 169 F.(2d) 759, 764, CCA 8th, August 1948. In the cited case the court says, further:

> "Even more concretely, the language 'administrative regulation, order, ruling, approval, interpretation' in Sec. 9 seems to us to have reference only to some formalized expression by the administrator and not to any conduct or action on his part from which an employer may undertake to make deductions.
>
> "Such a formalism we believe inherent in the terms used. Indeed the very purpose of this part of Sec. 9 would seem to be to afford an employer security from penalty in his good faith reading of and justifiable reliance on express administrative declarations and pronouncements."

In the instant case the most that can be said of any of the exhibits offered by the appellees, which they contend constitute "administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States," is that the documents in question are nothing more or less than the demands of a party to the contract—a promisee—under a cost-plus-fixed-fee contract. It is to be noted that all of the documents, without exception, are signed by an individual whose title is "contracting officer" or whose title is

"district engineer." Certainly it can not be said that a contract or a letter from a contracting officer, or instructions to a contracting officer from his superiors, can be said to be of that genus of document which is contemplated in the terms "administrative regulations, orders, rulings, approvals or interpretations" of an agency of the United States. Applying the formalistic test set up by the 8th Circuit in the cited case, it is submitted that such documents fall far short of being of that genus required by Sec. 9 of the Portal-to-Portal Act of 1947. It is well settled law that the Fair Labor Standards Act of 1938, which is in effect amended by the Portal-to-Portal Act, is to be broadly construed in favor of the embployees and strictly construed against the employer. *Phillips v. Walling*, 324 U. S. 490. The cited rule of construction has been carried over and applied to the construction of the Portal-to-Portal Act of 1947. *Reed v. Day & Zimmerman*, 73 F. Supp. 892; *Jackson v. Northwest Airlines*, 76 F. Supp. 121, 125; Code of Federal Regulations, Title 29, Ch. 5, Part 790, published in Federal Register Nov. 18, 1947, Sec. 790.2. This court will give great weight to the administrator's opinion just cited. *Skidmore v. Swift & Co.*, 323 U.S. 134.

Applying the strict rule of construction to the terms "adminstrative regulations, orders, rulings, approvals or interpretations" in favor of the employee appellants necessarily excludes the words "contracts, letters, demands or interdepartmental communications" of the contracting officer. *Expressio unius exclusio alterius est.*

The formalistic test applied by the 8th Circuit in

the *Wolferman* case, cited *supra*, should be appiled by this court.

2. The contracting officer of the Corps of Engineers as the individudal upon whom these appellee companies purport to have relied is not an agency of the United States competent or qualified to issue or promulgate an administrative regulation, order, ruling, approval or interpretation within the meaning of Section 9 of the Portal to Portal Act of 1947.

It is submitted that the acts, conduct and communications of a contracting officer a civilian employee of the Corps of Engineers, which is a part of the Supply Forces of the United States Army, and directed to an employer under the terms of a cost-plus-fixed-fee contract, are not the *promulgations of an agency* of the United States within the meaning of Sec. 9 of the Portal-to-Portal Act of 1947 (R. 372, 373). In the instant case Mr. John Noble testified that General Nold signed the contract between the War Department and the employer and that he was one of the contracting officers who had the authority reserved to the contracting officer under the contracts here under consideration (R. 377). He performed all those functions of approval, certification or authorization that the terms of the contract between the employer and the War Department required to be done by the contracting officer (R. 379). He testified that he initiated essentially all of the instructions that were promulgated by the War Department to the contractors here in question (R. 380).

While the term "any agency of the United States" is not defined in the Portal-to-Portal Act, it clearly

appears from legislative definition of the term "agency" and other federal statutes and legislative reports. See definition of "federal agency," Federal Register Act, Sec. 4, 44 U.S.C.A. 304; definition of "agency," Administrative Procedure Act, Sec. 2(a), 5 U.S.C.A. 1001(a); Senate Document 248, 79th Congress, 2 Sess., 196, 247, 408; U. S. Gov't. Manual, 1947, 2d ed., Appendix A, 628. The best construction that may be given to the exhibits which the appellee contend are tantamount to governmental "administrative regualtions, orders, rulings, approvals or interpretations of an agency of the United States," is that they signed a contract with an individual, General Nold, who it is true was connected with the War Department, and furthermore that they received at least 50 letters from individuals who denominated themselves "contracting officers," and who it is true were employees of the Corps of Engineers of the United States Army. However, that is a far cry from holding that these individuals were an agency of the United States upon whose fiat reliance in good faith could be placed. See *O'Riordan v. Nick F. Helmers, Inc.*, 8 Wages & Hours Cases 134, 137; *Jackson v. Northwest Airlines*, 76 F. Sup. 121.

It is significant to note that in the instant case the contracting officer testified that he was never requested by any of the defendant companies to obtain a ruling from any of the officials of the Wages and Hours Division of the Department of Labor with respect to the coverage of the Fair Labor Standards Act over any of the contracts herein involved (R. 419, 427). He further testified that during the life and progress

of the construction on the contracts herein involved, he was never called upon to investigate or determine the particular tasks or duties performed by any of the claimants in this case (R. 422). He further testified that he knew that there was nothing in the submission connected with the Abersold directive, Ex. 16, that related to the Fair Labor Standards Act (R. 419). Mr. Noble further testified that there was not a single communication in evidence sent by him or by the War Department to the appellee companies which authorized or which stated or purported to state that the War Department or the contracting officer had any authority to pass upon the question of whether the Fair Labor Standards Act covered or applied to the work of the claimants on the subject herein involved (R. 452).

It is submitted that under the facts the War Department neither purported to act nor did it in fact act as an "agency" of the United States within the meaning of Sec. 9. Quite the contrary, both the War Department and the contracting officer acting for the War Department were both in fact and in law the promisees under a contract with the appellee companies, and any demands made by the contracting officer or the War Department under that contract were both in fact and in law the demands of a promisee under a contract. To say that the demands of the War Department or of the contracting officer under such a contract are the official administrative promulgations of an agency of the United States, is to close one's eyes to the admitted fact, which stands out in the record, that the War Department and the con-

tracting officer acting for the War Department was a party to and a promisee under the contract. It is believed that an agency of the United States, as contemplated by Sec. 9 of the Portal-to-Portal Act, contemplates the acts and promulgations of an agency acting in its governmental capacity and not acting in its executive and contractual capacity.

The framers of the Portal-to-Portal Act did not see fit to define the word "agency." But certainly, the framers of the Act did not intend the demands of a contracting officer, a mere employee of a branch of the United States Army, to be the fiat of an "agency" of the United States government. It is respectfully submitted that the District Judge erred in holding that that War Department or its contracting officer acting in the contractual capacity as promisee under a cost-plus-fixed-fee contract was an "agency" of the United States within the meaning of that term as employed in the Portal-to-Portal Act of 1947. Cf. *Wolferman, Inc. v. Gustafson*, C.C.A. 8th, 169 F. (2d) 759.

3. The record discloses no sufficient evidence of good faith or reliance such as would serve under the Portal to Portal Act to exonerates appellee companies from liability.

Did appellee companies sustain the burden of proof resting upon them under their pleadings and under Section 9 of the Portal-to-Portal Act to establish that the "act or omission complained of" (violation of the Fair Labor Standards Act) was *in good faith in conformity with and reliance on* an administrative regu-

lation, order, ruling, approval or interpretation of any agency of the U. S.? Was there any such regulation or ruling warranting the appellee companies in believing that they were free from liability under the Fair Labor Standards Act? We submit that the record is entirely barren of anything of that character. There is no

(1) administrative regulation;
(2) administrative order;
(3) administrative ruling;
(4) administrative approval;
(5) administrative interpretation

of any agency—least of all of the Administrator of the Wages and Hours Division—undertaking to instruct or advise appellee companies that they were free with impunity to disregard or violate the Fair Labor Standards Act. There is nothing upon which the defendants could *in good faith* rely as a justification for such violations; nothing, to use the lexicon language definitive of the term "rely," upon which they could "rest with confidence or certainty" upon an assurance from any agency that the employment here in question was free from the coverage of the Fair Labor Standards Act.

There is no dispute, and it is clear from the testimony of Vice-President Northcutt, representative of appellee companies, and Mr. Noble, contracting officer for the Corps of Engineers, that neither the companies nor the Army Engineers at any time deviated from the terms of the original contract. They conformed literally to the contract and the failure to pay overtime was exclusively due to the contract pro-

vision with regard to non-manual and Group B employees. The various exhibits, they declared, which were in the form of letters and communications from the War Department to the contracting officer and from the contracting officer to the appellee companies, had no effect in changing the terms of the prime contract. Is such a contract, therefore, an "administrative regulation, order, ruling, approval or interpretation of an agency of the U. S."? We submit that it cannot be so considered. Congress in enacting Section 9 of the Portal to Portal Act of 1947 used careful, meticulous language to define the conditions under which the employer companies might absolve themselves from admitted liability for violation of the Fair Labor Standards Act. *Exoneration was not presumed.* A burden was placed upon the employer. He was compelled by the Act to prove reliance, not generally upon anyone connected with an agency of the U. S., but specifically upon an administrative regulation, order ruling, approval or interpretation of such agency. Congress did not include in enumerating conditions of exoneration the terms of a contract. It would be strained indeed to treat a contract such as the prime contract here in question as synonymous with Congressional language of "regulation, order, ruling, approval or interpretation." Having chosen to enumerate these particular conditions of exoneration, Congress thereby in effect excluded such a contract from the conditions upon which reliance might be predicated (Cf. the rule of *expressis-exclusio*).

It is clear too from the record that appellee companies relied upon the contract for a reason wholly

other than that of an assurance of their non-liability under the Fair Labor Standards Act. The contract in fact gave no such assurance. They relied upon the contract solely in order to entitle themselves to reimbursement in accordance with its terms (R. 478, 219, 475). Reliance of such a nature and for such a purpose cannot now be belatedly construed as a belief in good faith that the Fair Labor Standards Act had no application to them. It is apparent in fact that appellee companies were entirely indifferent to the applicability of the Fair Labor Standards Act. Any risk of liability incident to violation of the Act was entirely underwritten for them. They themselves assumed no responsibility. In the event it should be determined—as by the judgment of the trial court it was so determined—that the companies owed a liability under the Act, both by the terms of the contract and by the terms of the War Procurement Regulations, of which they were aware, they were entitled to reimbursement. They were indemnified.

The good faith contemplated in the statute must necessarily rest upon some criterion which has to do with the relationship between the appellee companies and these plaintiff employees. It contemplates an honest, intelligent reliance upon some regulation or order of a U. S. agency sufficient to justify a reasonably prudent business man that the employer owes no obligation for compensation to these plaintiff employees. There is obviously nothing in common between the obligation of the appellee companies to pay compensation to the plaintiff employees provided for under the Fair Labor Standards Act and the unrelated

right of the appellee companies to procure reimbursement from the U. S. in accordance with the terms of their contract.

Nowhere in the record is there any evidence, oral or documentary, of any "regulation, order, ruling, approval or interpretation" undertaking to construe the Fair Labor Standards Act as not applicable to the employment of these appellees. Vice President Northcutt related that in 1941 before the construction work here involved was initiated, he had a vague understanding, the source of which he did not recall, that the Fair Labor Standards Act did not apply to such construction. The companies were necessarily aware of the impact of the Fair Labor Standards Act. Procedure for reimbursement of costs arising by reason of its terms was called to the companies' attention by the Corps of Engineers in Exhibit 21. No attempt, however, was made by the Corps of Engineers to advise appellee companies whether or not the Fair Labor Standards Act applied in their construction and employment. Obviously, of course, it was not the function of the Corps of Engineers to administer or construe that Act.

It is clear from the evidence that the company never at any time had any assurance from any U. S. agency of the non-applicability of the Fair Labor Standards Act. On the contrary, they were definitely apprised by the U. S. Engineers that the Wages and Hours Division—that department which by Congress was charged with the administration of the Act—claimed the act to apply (Ex. 75). This alone, without taking into account other sources of information available

to the company with respect to the coverage of the Fair Labor Standards Act, was notice not that the act did not apply, but that the authoritative agency in charge of administering the act definitely construed it as applicable. This knowledge, alone, thus brought home to appellee-companies, is a conclusive and indisputable negation by the company of any reliance whatsoever in good faith or otherwise upon a "regulation, ruling, order, approval or interpretation" of non-liability under the Fair Labor Standards Act. Nor was this the sole source of information brought home to appellee companies of the position of the Wages and Hours Division, claiming applicability of the Fair Labor Standards Act to the construction employment here in question. Exhibit 73, a letter written by the Branch Manager of the Seattle office of the Wages and Hours Division of the U. S. Department of Labor, to Mr. Northcutt, was a direct, positive and affirmative notification to defendant companies of the applicability of the Act. Was this not sufficient to have induced a reasonably prudent business man to entertain a great deal of doubt of his right to avoid the obligations and liabilities imposed by the Fair Labor Standards Act? Would it not in fact have induced any ordinary prudent, reasonable business man to conclude to the contrary? Does it not dispel any inference now sought to be drawn *post litem motam* of good faith and reliance upon an assurance of non-coverage?

Let us note the companies' conduct upon receipt of this notification. It made no inquiry of any authoritative or competent official of the Wages and Hours

Division with respect to the problem involved. It merely referred it to the Seattle office of the District Engineer. In due course, some five or six months later, the Engineer's office replied, advising the company to persist in its refusal to pay compensation in accordance with the Fair Labor Standards Act, but likewise notified the company that its continued refusal to do so might be productive of litigation and instructions with respect to such prospective litigation were included in the communication (Exhibit 59).

Further knowledge on the part of the appellee companies, as well as the Army Engineers, of the imminency of litigation to enforce compliance with the Fair Labor Standards Act is to be found in Exhibits 57, 62, 65 and 79. Exhibits 20 and 21 conclusively show that appellee companies were aware of the fact that the Fair Labor Standards Act was administered by the Wages and Hours Division of the Department of Labor. Mr. Northcutt, representative of the appellee companies, likewise so testified (R. 9, 11). (See also Federal Register, Mar. 21, 1944, p. ....., which in addition to prescribing litigation procedure sets forth the terms of the Fair Labor Standards Act.) How much good faith, therefore, could arise out of the company's failure to inform itself of the regulations, orders, and rulings of the particular agency of the U. S. charged by law with administering the Fair Labor Standards Act?

The truth of the matter is plainly evident both from the testimony of the company's representatives on the trial and from the exhibits in evidence. The company was totally unconcerned with the whole prob-

lem involved in the application of the Fair Labor Standards Act. Whether its terms applied or did not apply was a matter of total indiffrence to appellee companies. They felt no obligation to ascertain its effect upon their construction employment. They were safe in any event. They stood to suffer no loss and no ultimate liability in the event penalties or liabilities should accrue from failure to comply with its terms. They had complete and total indemnification.

Good faith toward these plaintiff employees; good faith in acting upon an assurance of any agency that the Fair Labor Standards Act had any relevancy to its business or employment can never stem from such equivocal conduct. Indemnification against the risks involved in violation of the Act cannot give rise to good faith. On the contrary, indemnification proceeds upon an assumption of liability.

Note the following sequence of facts with respect to the applicability and effect of the Fair Labor Standards Act which were, throughout the period of the contract in question, openly and easily available to the company:

(1) The fact that the Fair Labor Standards Act, as amended, had been on the statute books of the U. S. since 1938;

(2) The fact that it was administered by the Administrator of the Wages and Hours Division, who had published complete regulations and interpretative bulletins with respect to its coverage, which publications were easily available to appellee companies.*

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*See, v.g., the "Wages and Hours Manual," 1943

(3) The fact that as far back as 1943 the Act had been judicially construed as applicable to similar employment (*Timberlake v. Day and Zimmerman* (U.S. D.C., S.D., Iowa) 49 F. Supp. 28);

(4) The publication of War Department procurement regulations in the Federal Register;

(5) Personal knowledge by representatives of the defendant companies that the Wages and Hours Division administering the Act claimed its applicability to this particular employment;

(6) Notification from an authoritative representative of the Wages and Hours Division that the Fair Labor Standards Act was applicable to the employees of the appellee companies;

(7) Advice from the Corps of Engineers that the Fair Labor Standards Act war conceded as applicable to the appellee companies by the Wages and Hours Division;

(8) Knowledge by the appellee companies that they might violate the Act with impunity since they were assured in any event of indemnification and reimbursement.

A mere recital of these facts and considerations is sufficient, we submit, to preclude a claim by appellee companies that they or their officers acting as reasonably prudent business men relied upon an assurance from any agency of the U. S. of the non-applicability of the Fair Labor Standards Act. The probative effect of these facts and of this evidence is totally to the contrary. They received no assurance of non-

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(B.N.A.) p. 257, digesting interpretations of the Wages and Hours Division, in which similar construction work under the Army Engineers in the Caribbean was held subject to the F.L.S. Act.

applicability. They were not concerned with the question either of applicability or non-applicability. They chose not to conform to the Act with full knowledge of the Act, its coverage and of the fact that those in charge of its administration, the Wages and Hours Division, maintained that it applied to appellees. They assumed the risk involved in non-conformity to the Act entirely and with little concern with respect thereto for in any event they relied implicitly upon their right to reimbursement for liability arising therefrom and to indemnification. Such conduct is the very antithesis of "reliance in good faith" as those terms are understood in law.

A brief reference to applicable cases may, we believe, be helpful. Let us notice *Burke v. Mesta Machine Co.* (U.S. D.C. W.D., Penn., July 27, 1948) ..... F. Supp. ....., 8 Wages and Hours Cases 175. There an employer who erroneously excluded incentive bonus earnings of employees from computation of overtime pay, relying upon approval by an inspector of the Wages and Hours Division, was held in doing so not to have relied in good faith upon a ruling of the agency where in fact the advice of the inspector was inconsistent with the uniform and well publicized rulings and interpretations made by the Administrator of the Wages and Hours Division. Certain language of the decision is signfiicant:

> "It is apparent that Congress was concerned with the dilemma of those employers who sought interpretations of the Act, in accordance with well established administrative procedures that were open to them; if such interpretation subsequently proved to be erroneous the employer faced

a considerable liability. Having done all he could to obtain an authoritative statement of his obligations under the Act, the employer could lay a justifiable claim to equitable relief. * * *"

In the footnotes, 3 to 6 in the margin of the opinion, the court sets forth convincing quotations from the interpretative statements of the members of Congressional committees active in bringing about enactment of the Portal to Portal Act, clearly evidencing a purpose to withdraw the benefit of the defense under Section 9 from those employers who had notice either of a construction by the Wages and Hours Division of the coverage of the Fair Labor Standards Act or notice even of a dispute between agencies in which the agency responsible for the administration of the Act claimed it to be applicable. Speaking specifically of good faith, the court declared:

"Good faith cannot be established as a simple fact. It is an ultimate fact, a conclusion to be drawn from the circumstances (cases). * * * It has been held to denote honesty of purpose, the actual existing state of mind, without regard to what it should be from given standards of law or reason. In others it has been defined as honesty of intention and freedom from knowledge of circumstances which ought to put the defendant on inquiry (cases)." Citing also Interpretative Bulletin, Portal to Portal Act, by Administrator, Wages and Hours Division, 29 Code Regulations, Chap. V, Part 790, Sec. 790-19, Nov. 1947.

"* * * The defense of good faith is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies without

notice that such interpretations were claimed to be erroneous or invalid. I do not believe the defendant has satisfied the burden of proof required by the Portal to Portal Act."

The question of good faith was discussed in *Newspaper Guild v. Republican Publishing Co.* (June 21, 1948, U.S. D.C., Mass.) ..... F. Supp. ....., 8 Wages and Hours Cases, 140. There certain employees of the newspaper were held to be entitled to overtime compensation under the Act, as against the claim of the employer that they were exempted therefrom as executive or administrative employees. There, too, the employer invoked the good faith defense of the Portal to Portal Act, in this instance Sec. 11, to avoid liquidated damages for adjudicated liability. The employer as a member of the Association of Newspaper Publishers of America had been advised that the Act did not apply to its Springfield newspapers. The employer did not, however, consult legal advice on this issue nor did it obtain or rely upon a ruling of the Administrator of the Wages and Hours Division with respect thereto. The court said:

"The defendant was either not aware of or not interested in the fact that in April 1943 the Wages and Hours Division of the Department of Labor had published a manual of newspaper job classifications. The defendant, at least until late 1945, when a criminal indictment under the Act was filed against it, never consulted attorneys on the question of the application of the Act. So far as it is a question of fact, I find, therefore, that the omission of the defendant to pay overtime compensation was not in good faith

nor did the defendant have reasonable grounds for believing that its omission was not a violation of the Act in the sense that these terms are used in 29 U.S.C.A. 260."

And again

"I am convinced that an employer can no longer in good faith consider the Act inapplicable after Wages and Hours Division inspectors, chosen experts in the interpretation of the Act, have indicated their opinion by asking questions concerning the work week of the employees. To be sure the employer is not thus precluded from arguing the point through the heirarchy of the courts, but he cannot continue to claim good faith as that phrase is used in Sec. 11 of the Portal to Portal Act."

CONSTITUTIONAL ISSUE

We in this brief do not resurvey the entire field of constitutionality of the Portal to Portal Act. We concur and hereby adopt the argument made with respect thereto in the *Sessing* case, a companion case herewith. We do, however, devote ourselves here to an argument which is of first impression with respect to the Portal to Portal Act. It is simply this: That irrespective of the economic factors and conditions which warranted the enactment of the Portal to Portal Act of 1947 so far as purely "portal" or "fringe" activities are concerned, such factors, such economic conditions and such motivation do not support the constitutionality of the retroactive provisions of the Portal Act when applied to other than "fringe" or "portal" activities, that is, when applied as here to ordinary wage and hours cases involving overtime

rates of pay for work admittedly and actually performed. As to such ordinary overtime compensation cases, there is no evidence either in fact or in the preamblatory recital in the Act of any threat to the national economy, any danger of national bankruptcy or any national emergency whatsoever. These considerations, so far as they operated to move Congress to enact the Portal to Portal Act of 1947, applied solely to the "portal" or "fringe" aspects of the problem. Let us briefly consider this problem under the following topics:

1. Classification of Portal cases and ordinary cases.
2. Attack on findings.
3. Facts supporting findings.

1. Classification of portal cases and ordinary cases.

Congress itself in the Portal Act has clearly distinguished between these two classes of cases. In Sections 2 and 4 of the Portal Act the problem of fringe activities is dealt with *exclusively, i.e.*, the *ordinary* cases are not therein covered. In Sections 9 and 10 ordinary cases are treated (although presumably portal activities might also be covered). In any event, the fact that Congress was able to differentiate between the types of cases disposes of the classification problem. We parenthetically call attention to the usual "separability" clause in Section 14.

2. Attack on findings.

Congress in Section 1 has enumerated many catastrophic conditions produced by what it conceived to be judicial misconstruction of the Fair Labor Standards Act, but has premised its finding thereof upon

the portal and fringe aspects rather than upon the ordinary cases of overtime compensation. Even where incidentally or collaterally retroactive legislation, serving to deprive these plaintiffs of their right theretofore vested in and to overtime payments under the Fair Labor Standards Act of 1938, is predicated upon such a recital of Congressional findings, it is nevertheless open to us to attack such Congressional findings and the facts presupposed therein by showing that in fact the supposititious conditions referred to do not actually exist. Upon these premises we propose to do so here *as applied to ordinary overtime wage-hour cases.*

Admittedly appellants are assuming a heavy burden for Congressional findings must be upheld by the courts "if the question of what the facts establish be a fairly debatable one, it is not permissable for the judge to set up his opinion in respect of it against the opinion of the law maker." * * * And if the court be "unable to say the finding is clearly unfounded," the court is "precluded from reviewing the legislative determination." *Radice v. New York*, 264 U.S. 292, 294 (1942); *Old Dearborn Co. v. Seagram Corporation*, 299 U.S. 183, 195 (1936).

The importance of the existence or lack of existence of facts to support the Congressional findings is simply this. Usually Congress cannot deprive one of his property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922). Thus, usually the jobsite employees here involved cannot be deprived of their pay for the extra two hours a day they worked.

But apparently there has grown up a doctrine that

if the United States be faced with a great national emergency, then the national government may do anything to prevent the catastrophe. Thus, to prevent national bankruptcy or some other equivalent national emergency, Congress, so the theory goes, could validly destroy retroactively rights previously secured by the Fair Labor Standards Act. This doctrine received its greatest support from the Mortgage Moratorium case, *Blaisdell v. Home Building & Loan Association*, 290 U.S. 398, and inferentially in *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 242. Now, if no national bankruptcy or national emergency were to ensue exclusively from ordinary wage-hour judgments then there would be no need to apply the doctrine and as to the instant cases the law would be unconstitutional.

3. Facts supporting findings.

To answer the question: "What facts exist to support the findings?" We turn to the Congressional hearings (a copy of which, for convenience, we will lodge with the court at the time of argument) of which this court may take judicial notice. (We likewise will lodge a copy of the Congressional Record, which contains all the debates in Congress on the various bills which finally resulted in the Portal Act). During the then nine years of the Fair Labor Standards Act's existence there has not been one case of bankruptcy because the employer had to pay overtime or minimum wages prescribed by the Act.

The most that can be said from a reading of the entire record and hearings is that a few isolated industries had a few lawsuits filed against them amount-

ing to one or two per cent of the amount which had been filed for truly "portal" or "fringe" claims.

When the findings in Section 1 are removed from the court's consideration with respect to ordinary claims then the ordinary rules that the Supreme Court has invoked many times should be applied, namely, a retroactive destruction of property rights must be declared unconstitutional. See *Ettor v. Tacoma*, 228 U.S. 148; *Steamship Company v. Joliffe*, 2 Wall. 449; *Worthen v. Thomas*, 292 U.S. 426; *Coombes v. Getz*, 285 U.S. 434 (1932).

Some mention in the recent cases has been made that Congress in its exercise of its commerce power is unfettered by the due process clause of the Fifth Amendment. Such is simply not the law. The Fifth Amendment is inextricably intertwined with the commerce power. *North American Co. v. SEC*, 327 U.S. 147 (1946); *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, Note 19 (1935). And see also Story on the Constitution (5th edition) Vol. II, Paragraph 1835 to 1891.

Likewise, the doctrine of frustration which the Attorney General of the United States has been arguing in these cases on the basis of *Louisville and Nashville Railroad v. Mottley*, 219 U.S. 467, wherein the Congress destroyed railroad free passes, and *Omnia & Co. v. United States*, 261 U.S. 502, wherein the United States was not held liable for the destruction of a steel contract, is not applicable here. To understand the *Mottley* case, one must read *New York Central and Hudson Railroad v. Gray*, 239 U.S. 583 (1916), in

which the holder of a free pass, given in consideration of personal services was held entitled to compensation in money in lieu of his free pass. Likewise, there is nothing in the *Omnia* case which says that the purchaser of the factory received nothing of value from the seller. It held merely that he could not receive payment in steel, but under the doctrine of the *Gray* case he could have sued for its reasonable value.

Nor does the *Mottley* case stand for more than that which was actually decided therein. There was there no retroactive deprivation of an accrued property right. Both the decision and the Act therein construed undertook to speak prospectively only and to forbid the enjoyment of the pass in question upon the grounds of a newly declared public policy. The decision expressly, however, reserved the contract right of the parties to have the value — albeit perhaps a commuted value — of the original contract. This case cannot in any wise be strained to the extent of supporting a holding in favor of the power of Congress merely by reason of its plenary power over interstate commerce at will to deprive parties of their contractual rights to property.

Hence, these employees, having rendered their service, are entitled under the doctrine of the *Gray* case to be compensated therefor.

Whatever, therefore, may have been the considerations which prompted Congress to suppress portal to portal or fringe claims, and to do so retroactively, such considerations have no force whatsoever when wrenched out of their context and applied to the standard ordinary overtime compensation provis-

ions of the Fair Labor Standards Act. On the contrary, all of the reservoir of fundamental constitutional law which has traditionally abhorred legislation amounting to retroactive deprivation of property applies here to protect the plaintiffs below in the enjoyment of their rights to such compensation as vested in their favor at the time that the services were rendered. We are not concerned here with the right of Congress in the exercise of its plenary power over commerce to abrogate such rights prospectively or to withdraw the benefit of the Fair Labor Standards Act *in futuro*. We submit, however, that the legislation here in question, both Section 9 and Section 11 of the Portal to Portal Act of 1947, which does not undertake to repeal the Fair Labor Standards Act of 1938, as amended, but merely to confer unilaterally upon certain employers the right to relieve themselves of liability, which accrued prior to its enactment, violates basic principles of due process. Plaintiffs below became entitled *eo instante* to their compensation at the end of each day and the end of each week that their services were rendered. Immediately then and there a debtor-creditor relationship between themselves and the employer companies arose. The company then owed them the sums herein found in their favor for overtime compensation under the Fair Labor Standards Act. Congress could not retroactively within the limits of due process, take these sums from the plaintiffs below which represented earnings for their services and thus unilaterally bestow them upon or award them to appellee companies.

CONCLUSION

Sec. 9 of the Act affords a defense to the employer, who pleads and proves that his failure

> "* * * to pay * * * overtime compensation under the Fair Labor Standards Act of 1938, as amended, was (1) in good faith, (2) in conformity with, and (3) in reliance on any administrative (4) regulation, order, ruling, approval or interpretation of any (5) agency of the United States." (Numbers ours)

The instant appellees admit that they failed to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended; but contend they did so (1) in good faith (as evidenced by their knowledge and conduct at the time of the admitted violation); (2) in conformity with (as evidenced by the testimony herein) and (3) in reliance on (as evidenced by their knowledge and acts which they contend necessarily gives rise to an inference tantamount to "reliance"); (5) "an administrative regulation, order, ruling, approval or interpretation" (as evidenced by Exhibits 13, 14, 15 and 16, which appellants characterize as being documents of the genus referred to in the quoted words of the statute; (5) of any agency of the United States (appellants contend that the documents, Exhibits 13, 14, 15 and 16, transmitted to them through the medium of their "contracting officer" under their contract, are the promulgations of the nature described in (4) "considered together with Exhibits 1 through 12, necessarily make the "contracting officer" or "district engineer" "an agency of the United States."

The appellees submit that the proof of the appellants as summarized above not only falls far short of the requirements of the statute (Sec. 9 and 11 of the Portal to Portal Act of 1947) which appellees seek to invoke to exonerate themselves from admitted liability, but actually fails to establish anything save performance of a contract, which performance the appellees knew or had reason to know violated the Fair Labor Standards Act in so far as these instant claimants are concerned.

The appellee companies were not obliged by the Corps of Engineers of the Army Supply Forces under their contract or because of any demand made upon them by the War Department, in its capacity as a contracting party, to employ and pay these claimants for one job description and actually work and use them in another capacity wholly different from that job description for which they were employed. The job description for which the appellee companies hired these people is one thing; what work they did is quite another. The latter, alone, is the focal fact which makes an employee subject to the Fair Labor Standards Act. It was the appellee companies who actually assigned to the employees work wholly different from their job description, which made these appellants subject to the Fair Labor Standards Act. The work actually done by these people was done at the behest of the appellees, not at the behest of anyone else. In fact, no one else save the appellees was ever informed as to the work actually done. Since it was the work the claimants herein actually did, and not the *label* pasted on it by the employer, that brought these claimants within

the operation of the Fair Labor Standards Act, and since only the appellees knew what work these appellants did, it is difficult if not logically impossible to believe that the appellee companies have made out any defense under the Portal-to-Portal Act of 1947.

In conclusion it is respectfully submitted that the judgment of the trial court should be reversed for the reasons advanced by the appellants herein, and that the judgment of the trial court as entered on May 28, 1946, favorable to these appellants as to all causes of action be reinstated and affirmed.

Respectfully sumbitted,

WETTRICK, FLOOD & O'BRIEN,
Attorneys for Appellant.

NOTE: This cause, involving as it does issues substantially identical therewith, was consolidated for trial below with causes 11984 and 11985, entitled *Sessing v. Birch, Morrison & Knudsen*, and *Kohl v. Birch, Morrison & Knudsen*. It is likewise here on appeal on a consolidated record and we desire hereby to subscribe to and adopt by this reference the brief filed therein by Messrs. McMicken, Rupp & Schweppe.

APPENDIX A

Title 29, U.S.C. §207.—(a) No employer shall except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce; * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Title 29, U.S.C. §216.—*Penalties: Civil and Criminal Liability.*—(b) Any employer who violates the provisions of Section 6 or Section 7 of this Act (§§ 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action (June 25, 1938, c. 676, §16, 52 Stat. 1069).

Title 29, U.S.C. §251.—*Findings of Congress; Declaration of policy; Purposes of Act.* (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), has been interpreted judicially in disregard of long-estab-

lished customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for re-

funds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act (§251, *et seq.*, of this title) be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several states, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey (41:35, *et seq.*) and Bacon-Davis (40:276a, *et seq.*) Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining, and (3) to define and limit the jurisdiction of the courts. (May 14, 1947, c. 52, Part I, §1, 61 Stat. 84.)

Title 29, U.S.C. §258.—*Reliance on Past Administrative Rulings, Etc.* In any action or proceeding commenced prior to or on or after the date of the enactment of this Act (May 14, 1947) based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), the Walsh-Healey Act (41:35, *et seq.*), or the Bacon-Davis Act (40:276a, *et seq.*Q, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. (May 14, 1947, c. 52, Part IV, §9, 61 Stat. 88).

Title 29, U.S.C. §260.—*Liquidated Damages.* In any action commenced prior to or on or after the date of the enactment of this Act (May 14, 1947) to recover

unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16(b) of such Act. (§216(b) of this title) (May 14, 1947, c. 52, Part IV, §11, 61 Stat. 89).